SUPREME COURT OF THE UNITED STATES

AUG 26 1953
HAROLD B. WILLEY, Clerk

_____ TERM

NUMBER 291

RUSSELL S. SERIO,
PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Russell S. Serio, respectfully shows to this Honorable Court:

A

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana, New Orleans Division for the violation of the Harrison Narcotic Act, that on January 5, 1951 he had in his possession 100 capsules of heroin hydrochloride on which no tax had been paid. On September 11, 1952 he was placed on trial and convicted.

B

Petitioner avers that prior to the filing of the indictment aforesaid he had been charged in the Criminal District Court for the Parish of Orleans, State of Louisiana by means of a Bill of Information filed by the District Attorney, with the violation of R. S. 40:962

which makes the mere possession of 100 capsules of heroin hydrochloride a violation unless possession falls within certain specific exemptions which were not present in the case. On July 26,1951 petitioner was tried in the State Court and acquitted. Two days after the acquittal the same State Police brought the case to the United States Attorney following which petitioner was indicted in the Federal Court as aforesaid.

C

Petitioner avers that on September 11, 1952 he was brought to trial in the Federal Court and on that same day filed a Motion to Dismiss the Indictment (see Transcript P. 48), which was denied.

D

Petitioner avers that the Motion to Dismiss the Indictment was based on the legal proposition that having been previously, to-wit, in the State Court, adjudicated not guilty of possession of narcotics and since possession was a necessary element of the crime in the Federal Court the District Attorney was estopped to prosecute him, on the theory of estoppel or res judicata.

E

Petitioner avers that said plea is not a procedural plea such as the plea of former jeopardy which has been held not to apply where the State Court and the Federal Court are separately involved; but on the other hand is a matter of evidence; that the Criminal District Court for the Parish of Orleans, State of Louisiana is admittedly

a Court of competent jurisdiction and as a matter of evidence found the petitioner not guilty of possessing narcotics, which is the same narcotics and the same possession which was the foundation of the prosecution in the Federal Court.

Petitioner avers that the Criminal District Court for the Parish of Orleans, State of Louisiana, being a Court of competent jurisdiction its decision was entitled to full faith and credit by the Federal District Court and under the plea of estoppel or res judicata the motion to dismiss the indictment should be maintained.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals, Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, Number 14292, Russell S. Serio, Appellant vs. United States of America, Appellee, and that the said judgment of the United States Court of Appeals, Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

RUSSELL S. SERIO

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Office - Supreme Court, U.S.
FILED
AUG 26 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

NO. 291

RUSSELL S. SERIO

Appellant

versus

UNITED STATES OF AMERICA

Appellee

...oOo...

Brief in support of Petition for Writ of Certiorari

...oOo...

G. WRAY GILL
Counsel for Appellant

LLOYD C. HOFFMANN
Counsel for Appellant

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SPECIFICATION OF ERRORS RELIED UPON

1. The Court erred in denying Defendant's Motion to Dismiss the Indictment filed prior to the trial of the case.

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STATEMENT OF THE CASE

In an indictment brought in by the Federal Grand Jury filed August 31, 1951 (T. 2) the defendant was charged with the violation of the Harrison Narcotic Act (Title 20, Section 2593(A) USCA) in that on January 5, 1951 the Defendant had in his possession 100 capsules of Heroin Hydrochloride on which no tax had been paid.

The undisputed facts are that on January 5, 1951, the members of the New Orleans Narcotic squad were investigating a residence in the 2300 block of Chippewa Street in the City of New Orleans, about 9:30 P.M. During the course of their investigation, and while they were within the residence in question, the Defendant, Russell S. Serio, driving an old model Oldsmobile car, drove up on Chippewa, and parked his car on the river side between First and Soraparu Streets, just opposite the home of one Jerry Zuberbier, the object of the police investigation. The police after emerging from the Zuberbier residence went across the street and arrested Serio, who was seated in his car, after finding two packages, in paper gum wrappers, containing heroin hydrochloride, Serio was taken to his home where another investigation failed to disclose any narcotics, after which he was lodged in the First District Police Station on a State charge of possessing 100 capsules of heroin hydrochloride in violation of Revised Statute Title 40:962. On July 26, 1951, he was triedin the State Court and acquitted; two days later the same police brought the case to the United States Attorney who accepted charged against Serio and which ultimately resulted in his trial and conviction.

MOTION OF DEFENDANT TO DISMISS INDICTMENT

The trial of the case was set for September 11, 1952. On that date and prior to the Jury having been impaneled Counsel for Serio filed a Motion to Dismiss the Indictment (See T. 48). The Motion was presented to the Court and the Court immediately denied the Motion to Dismiss the Indictment, whereupon Counsel for the Defendant, Serio, objected (T.51). It must be said at this juncture that Counsel had no opportunity of perfecting the Motion to Dismiss the Indictment but for the purpose of this presentation it must be assumed that the allegations in the Motion to Dismiss are true although there is ample evidence both from the standpoint of the government and defense witnesses that this case was tried in the State Court and the Defendant was acquitted. It is further clear from the evidence that the witnesses were identical. At least for the purpose of this discussion it will not be denied by the government that the allegations contained in the Motion to Dismiss are correct. We would like to make it clear that we are not predicating the motion to Dismiss the Indictment on the fact that the Defendant has twice been placed in jeopardy. We are not unmindful of the fact that the elements of the crime with which the Defendant was charged in the Federal Court is not exactly the same as those elements in the State charge. As a matter of fact, in the Federal Court there was one additional element not present in the State charge, namely, that the heroin was not from the original stamped package, etc. The point we are emphasizing is that the possession

of heroin which is the basis of the prosecution in the State Court is the same possession which forms the basis of the prosecution in the Federal Court. In the State Court Serio was adjudged "not guilty" of Possessing heroin and following his acquittal for the first time the case was brought to the attention of the Federal Authorities and the charge was accepted. We contend that the government was without authority to accept charges against Serio without doing violence to the judgment of a Court of competent jurisdiction, that is, the State Court. The question of possession had been fully litigated and judicially determined in the State Court and therefore becomes res judicata which the Federal Court was bound to respect. In other words, we have here the application of the doctrine of estoppel which is to be clearly distinguished from a plea of former jeopardy. This rule of criminal law has been clearly recognized in the case of United States vs. Oppenheimer 242 U. S. 85. We wish to quote from this decision as follows:

> "Upon the merits, the proposition of the Government is that the doctrine of res judicata does not exist for criminal cases except in the modified form of the fifth amendment that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in particular cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a

jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitation is less than a protection against a second trial than a judgment upon the ground of innocense, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue, United States v. Kissell, 218 US 601, 610, but if upon a special plea of the statute permits the defendant to be prosecuted again. We do not suppose it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. Iowa v. Fields, 106 Iowa. 406. Wharton, Crim. Pl. & Pr. 9th ed., 406.

Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law and one judgment that he is free as matter of substantive law is

as good as another. A plea to the statute of limitation is a plea to the merits, United States v. Barber, 219 U. S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a Judge of great experience in the criminal law:

"Where a criminal charge has been adjudicated upon by the Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense ....In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J:, - The Queen v. Miles, 24 Q.B.D., 423, 431. The finality of a previous adjudication as to the matters determined by it, the ground of decision - Commonwealth v. Evans, 101 Massachusetts, 25, the criminal and civil law agreeing, as Mr. Justice Hawkins says. Commonwealth v. Ellis, 460 Massachusetts, 165. Brittain v. Kinnaird,1 Brod. & B. 432. Secondly the same view was taken in Frank v. Mangum, 237 U. S. 309, 334, as it was also in Coffey v. United States, 116 U. S. 436,445."

We wish to also call the Court's attention to the case of United States v. Carlise, 32 F. Supp. 479, in addition to the case of United States v. Carlise, 32 F.Supp. 479, in addition to quoting from the Oppenheimer case. The Court stated:

"A very interesting, instructive, and well considered editorial on the subject, "Res Judicata with Respect to Criminal Judgments" appeared in the New York Law Journal on December 18th, 19th, and 20th, 1939. The author of which was Harry G. Anderson, Esq., of the New York Bar. Mr. Anderson aptly points out the distinction between former jeopardy and res judicata, as follows:

"The doctrines of res judicata, as generally stated, is that a final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of the rights of the parties, in subsequent actions with respect to the points in issue which have been determined in the earlier litigation. Good Health Dairy Products Corp. vs. Emery, 275 N. Y. 14, 17 (19 N. E. 2d, 758, 112 A. L. R. 401). Implicit in this doctrine is that the estoppel must be mutual that is, the party will not be concluded against his contention by a former jurisdiction if he could have used it as a protection had the judgment been the other way. Conversely, no person can claim the benefit of a judgment as an estoppel unless he would have been prejudiced by a contrary judgment or decision. Black on Judgments (2d Ed.) vol. 2, Sec. 548. In the more recent cases there has been a

relaxation of the rule of mutuality, but the Courts have found it difficult to classify the exceptions. Good Health Dairy Products Corp. v. Emery, supra; Liberty Mutual Ins. Co. v. Colon and Co., 260 N. Y. 305, 311, (183 N. E. 506). The res judicata rule has been extended to cases where the relationship established between the defenses in the earlier and subsequent litigations has been that of principal and agent, master and servant, indemnitor and indemnitee. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127, (32 S. Ct. 641, 56 L. Ed. 1009, Ann Car. 1913 E, 875). Other than these exceptional cases the requirement of mutuality remains an element of the rule. Schindler v. Royal Ins. Co., 258 N. Y. 310, 313 (179 N. E. 711, 80 A.L.R. 1142.)'

"The courts have frequently referred to the principle of res judicata in criminal cases. In transplanting the doctrine, however, to criminal law the requirements of mutuality had to be abandoned. A prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt. People v. Kief, 126 N. Y. 661, 663, (27 N.E. 556); People v. Walker, 198 N. Y. 329, 334, (91 N. E. 806). For this reason, doubt has been expressed as to whether the doctrine known to the Civil law has res judicia is applicable to criminal cases. People v. Rohns, 49 Hun. 150, 151, (1 N. Y. S. 672)."

"In a more precise sense the rule of res judicata as applicable in civil law cannot be said to have an exact counterpart in criminal law. There is, however, a rule of estoppel in Criminal Courts akin to res judicata. As thus used it is a rule of evidence which accords the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial."

"There is, however, a distinction between former jeopardy and res judicata, although the application of these princials is sometimes confused. People v. Rodgers, 184 App. Div. 461, (171 N.Y.S. 451), affirmed 226 N. Y. 671, (123 N. E. 882). The right to assert the claim of former jeopardy is guaranteed by constitution, New York State Constitution, Article 1, Section 6, which is also embodied in a statutory provision. Code of Criminal procedure, Section 9. To invoke the claim of former acquittal the accused must show that the prior offense was the same in law and in fact as that involved in the subsequent prosecution. 'The plea will be vicious, if the offense charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact'. People v. Grzesczah, 77 Misc. 202, 204, (137 N. Y. S. 538), and cases cited.

"Res Judicata, however, does not rest upon any constitutional provision. People v. Crvan, 123 Misc. 358 (205 N. Y. S. 852). To bring himself within the res judicata rule it is not necessary for the defendant to show that the offense for which he is being tried is identical in law

or in fact with the earlier criminal proceeding. Res judicata usually concerns itself with evidentiary or intermediate facts determined in the prior litigation. It must be noted, however, that the evidentiary or intermediate fact may, in some instances, be a complete bar to a second prosecution for another offense. An example of this will be found in a case where the defense upon the earlier trial was an alibi and the later trial is one for the commission of a crime committed at the time and place. Other examples will be found in the case hereafter referred to where the defendant was charged with having committed a single criminal act which resulted in two or more legally distinct crimes and where there has been a trial and acquittal for one of the crimes."

The case of Frank v. Mangum, 237 U. S. 309, is cited in support of the fundamental principal that "a question of facts or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties" and further "The principle is as applicable to the decisions of criminal courts as to those of Civil Jurisdiction". In the Mangum case the Federal Court passed on a writ of Habeas Corpus applied for on the same grounds as had already been passed on by a State Court and it was held that this was res judicata and could not be reopened in a Federal Court. This is very much the same situation as the case at bar wherein the State Court had previously passed on the "possession" of the

defendant and having adjudged the Defendant not guilty of that "Possession" this was res judicata and therefore could not be reopened again in a Federal Court. It is important to state that in the Oppenheimer case Supra, the issue of res judicata or estoppel was raised preliminarily by a motion to quash or a plea in bar which is essentially what was done in the Serio case. In other words, the question was raised by a motion to dismiss Indictment and the Oppenheimer case recognized that method of procedure in addition to recognizing the proposition of law contended for by the defendant.

The Courts have even extended the proposition by stating that even though there has been no formal acquittal of the particular offense on trial a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. See US v. Adams, 281 U. S. 202. In other words, the matter is one of collateral estoppe of the prosecutor. A rule of evidence has been recognized which accords to the accused the right to claim finality with respect to a fact or group of facts previously determine in his favor upon a previous trial. This was particularly borne out in the case of United States v. Carlies, Supra.

CONCLUSION

It is our contention therefore that the Motion to Dismiss the Indictment should have been granted and the trial court erred in its refusal to do so, and the United States Court of appeals, Fifth Circuit, in affirming the Judgment.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

This is to certify that a copy of this brief has been served on the Attorney General of the United States, opposing Counsel.

G. WRAY GILL

LLOYD C. HOFFMANN

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No. 291

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 14292

RUSSELL 9. SERIO,

APPELLANT,

VERSUS

UNITED STATES OF AMERICA,

APPELLEE.

APPELLANTS' PETITION FOR REHEARING

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14292

RUSSELL S. SERIO,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE HONORABLE THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT:

The petition of the Appellant for rehearing of the Appeal is based on the following grounds:

1. The error of the Court in holding that the Plea of res judicata is not applicable as between a State Court and a Federal Court particularly in this instance, where the defendant was tried and acquitted in the State Court and convicted in the Federal Court, he having been adjudicated not guilty of the element of possession in the State Court crime which was a necessary element of the Federal Court Crime.

POINT 1.

The holding of the Court with regard to the plea of Res Judicata urged by the Defendant Serio, was predicated on the theory that it was not the same soverign involved. In other words, in the first instance when Serio was acquitted of the possession crime the State of Louisiana brought the charges. Whereas, in the second case, the United States Government Statutes were violated. We concede that the soverigns are different in law, but the State Court is a Court of competent jurisdiction. The Plea of Res Judicata is not a procedural plea. A procedural plea such as the plea of former jeopardy has been held not to apply where the State Court and Federal Courts are separately involved, and an acquittal or conviction in one jurisdiction is no bar to a prosecution in the other. The decisions expressly hold that a plea of former jeopardy is not applicable under like and similar circumstances. The case of William v. United States, 179 Fed. (2) 644, cited by the Court recognizes the plea of Res Judicata and applied the rule. However, it does not go so far as to exclude a State Court as a Court of competent jurisdiction any more than it recognizes the rule as being applicable only between the Federal Courts.

The rule was also recognized in the case of Frank v. Mangum, 237 U. S. 309, but what is more significant this case originated in the State Court of Georgia. There the defendant had been tried and convicted on a charge of murder. Contending that he was denied a fair trial because of certain hostile

demonstrations and public sentiment, he filed a writ of Habeas Corpus in the State Court setting up the grounds on which he had been denied a fair trial. The writ was refused after the Court heard the evidence whereupon a similar writ was filed in the Federal District Court. In denying the writ the Federal District Court held, affirmed by the U. S. Supreme Court, "Every question presented by the application for Habeas Corpus having already been presented by him to the State Court and its decision invoked and its judgment rendered adverse to him, the principle of Res Judicata applies and for that reason alone (underscore mine) the question cannot be reopened here."

The Supreme Court in that case applied the rule of Res Judicata as between decisions of a State Court and a Federal Court without formally holding whether in the first instance such procedure was confined only as between Federal Courts or State Courts.

What is equally important is that as applied by the Federal Court in Frank v. Mangum the rule of Res Judicata was to the Defendant's detriment as compared to appellant Serio's case where he is trying to invoke the rule to his advantage.

Appellant submits that this Court should set aside their judgment affirming the judgment of the District Court and ordering the indictment dismissed.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, Lloyd C. Hoffmann, hereby certify that copies of the foregoing Petition for Rehearing has been served on the United States Attorney, Eastern District of Louisiana.

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May 18th, 1953.